

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR A. BUTLER,

Defendant-Appellant.

UNPUBLISHED

October 28, 2004

No. 248739

Wayne Circuit Court

LC No. 02-014180-01

Before: Kelly, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of felonious assault, MCL 750.82, malicious destruction of personal property (\$1,000 or more but less than \$20,000), MCL 750.377a(1)(b)(i), and possession of a firearm during the commission of a felony, MCL 750.277b. The trial court sentenced defendant to one year of probation for the felonious assault conviction, one year of probation for the malicious destruction of personal property conviction, and two years in prison for the felony-firearm conviction. We affirm.

Defendant contends that the verdict was against the great weight of evidence. When reviewing a motion for a new trial on the basis that the verdict is against the great weight of evidence, the test is whether “the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand.” *People v Gadowski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). “[A]bsent exceptional circumstances, issues of witness credibility are for the jury.” *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). When there is directly conflicting evidence and the testimony supporting the verdict is impeached, the credibility of witnesses is for the jury if “it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it.” *Id.* at 643, quoting *Anderson v Conterio*, 303 Mich 75, 79; 5 NW2d 572 (1942).

The trial court correctly recognized that the only real issue in contention was whether defendant used a gun during the assault. The prosecutor conceded that the victim’s mother was confused about some details of the incident and her whereabouts. She testified with certainty, however, that defendant possessed a gun during the assault. Her testimony was confirmed by the victim’s testimony and the recovery of a gun clip by the police. The trial court weighed this evidence against the testimony offered for the defense and concluded, utilizing its unique ability to interpret the witnesses’ testimony, “including tonal quality, volume, speech patterns, and demeanor,” that the victim and his mother were more credible. *Lemmon, supra* at 646-647.

Therefore, we conclude that the evidence did not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Gadomski, supra* at 28.

Defendant also argues on appeal that he was denied the effective assistance of counsel. The determination of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* "[B]ecause the trial court did not hold an evidentiary hearing, our review is limited to the facts on the record." *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). "For a defendant to establish a claim that he was denied his state or federal constitutional right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The defendant must overcome the strong presumption that counsel's actions constituted sound trial strategy under the circumstances. *Id.* at 302. Decisions on what evidence to present and whether to call or question witnesses are matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant first contends that defense counsel failed to advise him in his decision to waive his right to a jury trial. But the record reveals that the trial court questioned defendant pursuant to MCR 6.402(B) regarding his decision to waive his right to a jury trial. Defendant and defense counsel also signed a waiver form. Therefore, the record demonstrates that defendant was adequately advised.

Second, defendant claims that defense counsel failed to secure *res gestae* witnesses. But defendant has not identified the witnesses or the information they would have contributed. A party may not leave it to this Court to search for the factual basis to sustain or reject his position. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001).

Third, defendant argues that defense counsel failed to impeach the witnesses with documentary evidence. With regard to the senior center records, they were not contrary to the trial testimony, which established that the victim's mother had been at the senior center earlier in the day and at the house when the incident occurred. At any rate, because the prosecution conceded that the victim's mother was confused regarding her whereabouts, impeaching her testimony in this regard was unnecessary. With regard to the gun clip, it is not clear that documents pertaining thereto would have been favorable to defendant. Moreover, defendant has failed to demonstrate to this Court what these documents would have established.

Defendant also claims that defense counsel should have impeached the victim and his mother with past instances of fraud and deceit, mental illness, violence, and drug and alcohol abuse. But during cross-examination, defense counsel questioned defendant regarding his alcohol use on the day of the incident, a PPO served upon him by Greenfield, and a previous conviction for assault. Defendant has not demonstrated that further evidence of the victim's criminal history or civil litigation against the victim and his mother would have caused the trial court to reach a different verdict. Based on our review of the record, we conclude that defendant has not overcome the presumption that defense counsel's performance constituted sound trial strategy under the circumstances or that the verdict would have been different had defense counsel performed as defendant contends he should have.

Defendant also argues (1) that a new trial should have been granted on the basis of newly discovered evidence and (2) that the trial court's findings were clearly erroneous. But defendant failed to properly present these issues in his statement of issues presented. Therefore, we decline to address them. MCR 7.211(C)(5); *Campbell v Sullins*, 257 Mich App 179, 192; 667 NW2d 887 (2003); *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999).

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Hilda R. Gage

/s/ Brian K. Zahra